Filed 3/27/19 P. v. Davis CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALEX DAVIS, Defendant and Appellant.	A152259 (Alameda County Super. Ct. No. C604145 D)
THE PEOPLE, Plaintiff and Respondent, v. MICHAEL STILLS, JR., Defendant and Appellant.	A153136 (Alameda County Super. Ct. No. C604145 E)

A jury found defendants Alex Davis and Michael Stills, Jr., both guilty of one count of second degree murder based on their participation in a gun battle that caused the death of an innocent bystander, Chyemil Pierce, in front of her two young children. The jury also found true three firearm enhancements alleged against Davis, including that he personally and intentionally discharged a firearm causing death, and found that Stills or a principal was armed with a firearm during the murder. The trial court sentenced Davis to 40 years to life in prison and Stills to 16 years to life in prison.

On appeal, Davis claims that the prosecutor engaged in misconduct by insinuating that Davis was responsible for a shooting directed at a witness who testified against him

at the preliminary hearing. Both defendants also claim that the trial court erred by instructing the jury on mutual combat and not instructing the jury on the doctrine of transferred intent. Finally, Davis claims that he is entitled to a remand under Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620), which gives sentencing courts discretion to strike certain firearm enhancements in the interest of justice. We reject these claims and affirm, except we agree with the Attorney General that a remand is necessary for the trial court to consider whether to strike the firearm enhancements imposed on Davis.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. Third World and the Bottoms.

In March 2015, Pierce was killed near the intersection of 30th Street and Chestnut Street in West Oakland. The area is nicknamed "Third World" after a rapper from there. Of the people charged with crimes in connection with Pierce's murder, several were associated with Third World: Shelton McDaniels, who hung out in a house at that intersection; Davis, who was friends with McDaniels and also hung out at the house; Jerry Harbin, who shared a half brother with McDaniels and also hung out in Third World, although he was not from that neighborhood; and Stills, who grew up around Third World and often hung out in that area as well.

The other people charged were associated with another neighborhood of West Oakland known as "the Bottoms": Joneria Reed; her son, Dijon Ward; a cousin of hers, Anthony Sims, who was actually from East Oakland; and Julian Ambrose, who was friends with Ward.

Despite the prosecution's attempts to paint the shootout as a battle between warring groups, little evidence suggested there was any tension between the two neighborhoods at the time of the murder. To the contrary, several witnesses testified that the conflict that day grew out of personal disagreements. Indeed, as discussed further

below, the evidence showed a complex web of friendships and other connections between the two groups.

Several of the participants in the shootout are not parties to this appeal.[1] As to the two participants who are parties to this appeal, the evidence suggested that Davis shot the bullet that killed Pierce and Stills provided a rifle to another participant during the incident.

B. Harbin and His Girlfriend Go to Third World.

On March 9, 2015, Harbin, who was the only one of the four defendants to testify, bought a used red Porsche Cayenne SUV. Around 3:30 p.m., he picked it up from the seller at 30th Street and Broadway in Oakland. He left the car he had driven there, a rental gray Buick Regal, and drove the Porsche to 28th Street to pick up his girlfriend.

After getting his girlfriend, Harbin called McDaniels, whom he considered a brother. McDaniels was at a nearby liquor store, and Harbin headed there to show him the Porsche. While his girlfriend stayed in the car, Harbin got out and spoke to McDaniels, who was with Davis, a friend nicknamed Goofy, and another friend Harbin did not know. McDaniels told Harbin that there was a group of "maybe 15 to 20 women" in the Third World area who were "trying to basically hang out and have a good time" with McDaniels and his friends. McDaniels invited Harbin to come, and Harbin responded that he would meet McDaniels there after taking his girlfriend to pick up the Buick.

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[1] Davis, Stills, Harbin, and Sims were tried together in this case. After the jury indicated it was deadlocked on the murder charge against Harbin, he pleaded no contest to voluntary manslaughter. Sims was convicted of second degree murder and various firearm enhancements but was sentenced months after Davis and Stills were, and his appeal is currently pending in this division. (*People v. Sims*, A155339.)

The cases against McDaniels and Ambrose were still pending at the time of sentencing in this case. Ward pleaded no contest to being an accessory after the fact and received probation. Finally, Reed testified for the prosecution in this case under an agreement that if she was truthful, she would be allowed to withdraw her plea to murder and receive a six-year sentence for voluntary manslaughter.

Meanwhile, Harbin's girlfriend spoke on the phone to one of her close friends. Based on the conversation, Harbin's girlfriend believed that her friend was going to get in a fight with Ward's girlfriend and that another friend, R.B., might also become involved. R.B. had dated Donald Ward, Ward's brother and Reed's son, until his murder a few months earlier. R.B. was in the beginning stages of a relationship with McDaniels, whom she continued to date after he went to jail for Pierce's murder.

When Harbin returned to the Porsche and told his girlfriend they were going to get the Buick, she asked him if he could first take her to find R.B. Harbin had seen R.B. around 30th and Chestnut, where she lived, earlier that day, so he drove to that area. He testified that when he and his girlfriend arrived, there were "a lot of women in the middle of the street," including his younger cousin, who was best friends with R.B. The women were "in an uproar," and he "could tell something was going on." His girlfriend spotted R.B. and asked her to leave with them, but R.B. refused.

C. The Fight Between Harbin's Girlfriend and Ward's Girlfriend.

Reed and her sister had driven to Third World earlier that afternoon to visit a friend. Ward's girlfriend, the mother of his child, subsequently arrived at 30th and Chestnut to get Reed's EBT card to buy groceries. Two of Ward's girlfriend's female cousins accompanied her. At the time they arrived, Davis, Stills, and McDaniels were in the area.

Before Harbin and his girlfriend could leave after making contact with R.B., Ward's girlfriend approached the passenger's-side window of the Porsche and asked Harbin's girlfriend what she was looking at. Harbin's girlfriend responded, " 'I'm grown. I can look wherever I want,' " and they exchanged more words. Harbin's girlfriend testified that Ward's girlfriend did not like her because she had had a fling with Ward the previous year, but Ward's girlfriend denied ever "hav[ing] issues over [Ward]" with the other woman.

Harbin tried to drive away, but his girlfriend, whom he described as having an "explosive" temper, jumped out of the Porsche while it was moving. She "beeline[d] straight towards [Ward's girlfriend]," punched her, and grabbed her hair. Harbin's

girlfriend was bigger than Ward's girlfriend, and witnesses agreed that Harbin's girlfriend was winning the fight.

Several other women then joined the fight to help Ward's girlfriend. Among them were Reed's sister, both of Ward's girlfriend's cousins, and Harbin's cousin. R.B. saw Ward's girlfriend's younger cousin hit Harbin's girlfriend and intervened in an attempt to stop the fight, but she soon gave up in the chaos.

Meanwhile, Harbin got out of the Porsche and also tried to stop the fight. He saw his cousin punching his girlfriend, who was pregnant but not yet showing, and said, " 'You know she pregnant. You wrong. What are y'all doing?' " Several of the women were pulling his girlfriend's hair, and he tried to remove their hands from her head and pull her away from Ward's girlfriend.

According to Ward's girlfriend, Harbin "pushed people off of [his girlfriend], got violent with the girls," including hitting Ward's girlfriend's younger cousin. Ward's girlfriend's cousins agreed with this characterization, although the younger one allowed that Harbin was originally trying to break up the fight. Reed testified that as she was trying to stop the fight, Harbin "shove[d]" her to the ground. Harbin admitted that he pushed Reed as he was "breaking everyone up" but denied it was intentional.

Reed testified that she expected one of the men present from the Third World group would help her up, "since they were cool with [her deceased] son," and she became angry when no one did. A neighbor who lived near 30th and Chestnut testified that she "noticed a commotion" and then heard a female voice say, " 'You Third World niggas are some punk ass niggas,' " and refer to a woman's being pushed to the ground.

Reed stated that after being pushed to the ground, she said to Harbin, " 'Why the fuck you put your hands on me?' " She testified, "I remember someone saying, 'That's Donald mom.' And the next thing I heard was [Harbin say], 'Fuck you and your dead son.' " Ward's girlfriend and her cousins testified that they also heard this response. Harbin, however, denied saying anything to Reed about her son: "[S]he's saying that somebody said, 'That's Donald's mom,' that would mean as much to me as if somebody were to tell me you're Andrew's dad or you['re] Michael's mom. I don't know who

Donald is. I don't know this lady at all. [¶] That was pure embellishment. That's something that she created after Ms. Pierce [died]." R.B. did not hear anyone say anything bad about her deceased boyfriend either.

D. Harbin and His Girlfriend Leave.

After Reed fell, Harbin and his girlfriend got back into the Porsche. Harbin's girlfriend testified that she wanted to leave because she did not "want to put [Harbin's] life in jeopardy over a girl fight." Before they could drive away, Ward's girlfriend approached the passenger's-side window and tried to pepper spray Harbin's girlfriend, but nothing came out.

According to Ward's girlfriend, Harbin then "flashed" a handgun at her, at which point she backed away from the car. Her cousins also both testified that Harbin showed a gun. Harbin, a convicted felon, admitted that he was carrying a semiautomatic 1911 .45-caliber handgun at the time, but he denied showing it to Ward's girlfriend. When asked why he had a gun that day, he explained, "It's Oakland. It's like NASCAR. You're gonna wear seatbelts. You're not looking to get into a crash, but it happens."

Harbin, who was upset with his girlfriend for fighting, dropped her back off on 28th, which was about six blocks away. He then drove the Porsche to his uncle's house on nearby Mead Street, left it parked there, and got a ride to 30th and Broadway so he could retrieve his Buick.

Harbin testified that as he was driving the Buick, McDaniels called him and told him "to come back [to 30th and Chestnut] basically and straighten all of this out." Harbin explained that he did not drive the Porsche back to the area because he was already in the Buick, the Porsche had an alignment problem, and he "was on probation and . . . didn't want to get pulled over in this car because [his girlfriend] had a fight in this car." He testified that heading back to Third World, he thought he "had got rid of the problem and . . . [was] coming back to fix whatever had happened." He elaborated, "It's a fight between two 19-year-old girls. Like, I'm not expecting anybody to be hurt behind it."

E. Reed Calls Ward and Sims to the Scene.

Harbin's girlfriend testified that before leaving 30th and Chestnut with Harbin, she heard Ward's girlfriend say, referring to Ward, " 'Call my baby daddy.' " According to Harbin's girlfriend, Reed then grabbed the phone and talked to her son. Harbin's girlfriend and R.B. both heard Reed say something like, " 'This nigga put his hands on me.' "

Reed admitted that she called Ward and told him that someone had put hands on her, as well as that his girlfriend had been beaten up. Reed also admitted that Ward already knew she was in Third World and that she expected him to show up, even though she denied actually asking him to do so. Believing Ward might arrive, Reed also called Sims because she did "not want[] [her son] to be alone." Sims told her he was in East Oakland, which she testified made her think he would not come.

Ward's girlfriend's younger cousin testified that meanwhile, McDaniels "said something . . . like, 'You bitches aren't from around here,' " and told her and her cousins to leave. Ward's girlfriend's older cousin heard him say that "no one was gonna do anything to his brother," apparently referring to Harbin, and both cousins saw him run into a house. The older cousin claimed she then saw him come back out holding a "long gun." Fearing that "something bad was getting ready to happen," she urged Ward's girlfriend and their other cousin to leave, but Ward's girlfriend refused. Her cousins left, and Ward's girlfriend walked to R.B.'s house across the street to get a towel for her face, which was bleeding.

Shortly afterward, Ward, Sims, and Ambrose arrived at 30th and Chestnut. Ward was driving either a purple or blue Acura. Ward and McDaniels were friends, and both Reed and R.B. saw Ward speak to McDaniels. R.B. tried to talk to Ambrose, whom she had known for "[a] real long time," so she could tell him "what really happened, because [she knew] people already told him, like, [Reed] . . . got pushed and that was just stuck in his head that somebody pushed [Reed]." But when she called his name, Ambrose acted as if he was not "trying to hear" her and did not respond.

F. Harbin Returns, and the Shooting Begins.

R.B. testified, and Reed confirmed, that Reed's sister then yelled, " 'There that nigga go right there.' " R.B. saw Harbin driving down the street in a gray car and heard gunshots. Similarly, Ward's girlfriend testified that before dropping to the ground in R.B.'s house, she saw Harbin driving quickly down 30th and heard numerous gunshots. R.B. testified that she saw first Ambrose and then Sims shooting handguns toward Harbin's car. Reed also testified that before running away from the scene she saw Ambrose shooting toward a car, although she denied that Sims was even there.

R.B. testified that she also saw Davis, who was the only defendant who had dreadlocks, shooting toward Ambrose and Sims. She could not remember what Davis's gun looked like. To impeach this testimony, Davis introduced evidence that in a police interview soon after the murder, R.B. identified him but specifically denied seeing him shoot.

Harbin testified that as he was pulling in to park near the house where McDaniels normally hung out, he heard gunshots. One of the shots hit his car, and he realized that he was being targeted. He quickly turned his wheel to try to drive away, but "a bullet hit [him] in the back" and made him "inadvertently . . . jerk the wheel," causing his car to crash into a house and turning him perpendicular to the street. A bystander confirmed that he saw Harbin's car crash and get " 'lit . . . up.' "

Harbin tried to exit from the passenger's side of his car, away from where the gunshots were coming, but the door was blocked by the house's staircase. When he was unable to exit the car, he "pulled a gun out from [his] hip and [he] fired through [his] car door" toward "the direction of the bullet that hit [him]," but at a downward angle because his arm "locked up" when he tried to lift it. Harbin claimed that he shot in self-defense, explaining that he could not see who was shooting but could hear the shots getting louder. He testified, "[I]n my mind, they running up on my car and they about to finish me off." He denied that he would have gone back to Third World had he known he was in danger, saying, "These women were hanging with my brother [McDaniels], they were hanging

with my cousin. No[]where in my mind was I thinking that they were going to try to have me murdered."

After Harbin emptied his gun, the gunshots continued. He looked outside and saw McDaniels, who had positioned himself between Harbin and the intersection of 30th and Chestnut. McDaniels was shooting a Glock with an extended magazine toward the intersection, apparently in defense of Harbin, and Harbin later concluded that the louder shots he had interpreted to mean that someone was approaching his car were actually shot by McDaniels. Harbin testified that he backed up his car and drove away as McDaniels continued to shoot the Glock.

G. Stills Gives a Rifle to McDaniels.

The police interviewed Stills a few weeks after the murder, and portions of his statement were played for the jury. He said that when McDaniels first returned to 30th and Chestnut after the fight between the women "and they was making phone calls," McDaniels told him there was a rifle in the backseat of his car. At that point, Stills, who had a preexisting injury to his arm, told McDaniels, "I only got one arm. Like, how am I gonna shoot that mother[]fucker?"

Later, during the shootout, Stills saw McDaniels shooting a Glock, which jammed. After the Glock jammed, McDaniels asked Stills to "get his rifle out his car," a white Mercedes-Benz, and Stills admitted that he "grabbed [it] and . . . ran to Chestnut and . . . handed it to [McDaniels]." Stills then saw McDaniels point the rifle down Chestnut and shoot toward Ambrose. According to Stills, Ambrose was running the other direction while shooting behind him, toward Stills and McDaniels.

Stills told the police that he helped McDaniels because he felt as if he was stuck between the Bottoms and Third World groups, since he was friendly with people from both neighborhoods and was worried people might think he had "set this whole thing up or something." In Stills's words, "I just didn't want everybody to think I was a – a, like, scared or something. But, I was scared, though." He denied, however, that McDaniels or anyone else had threatened him or otherwise pressured him to retrieve the rifle.

The bystander who saw Harbin's car being shot at also confirmed seeing Stills, whom he knew from the neighborhood, running with a rifle in his hands after Harbin's car was shot at and before another round of shots ensued. Corroborating Stills's statement, the bystander testified that he did not see Stills either aim or fire the gun.

H. Pierce Is Killed and the Shooters Flee.

A contractor who was working at Pierce's house that day testified that he saw Pierce arrive home in her car with her children. As she was parking, he heard gunshots, and he dropped to the ground. A neighbor of Pierce's testified that after hearing several gunshots, she looked outside and observed Pierce "yelling at her children to run." The neighbor then saw Pierce fall face-first on the ground as she was following her children up the driveway. It was later determined that Pierce died from a single gunshot to the head and neck.

When the contractor looked outside, he saw a vehicle drive by and two men, one bleeding from the chest, "chasing after the car." Similarly, Pierce's neighbor testified that after Pierce collapsed she saw two "[v]ery young" males run down the street with black pistols their hands. They ran toward a dark blue Audi station wagon, where another man was "waving for them to hurry and get in," and then all three left in the car.

Another bystander who was around 28th and Chestnut testified that she heard dozens of gunshots that sounded like "a wild west shootout." The shots originally seemed like they were coming from about a block away but then got closer. She looked out the window and saw a dark "newer model car . . . [l]ike an Audi" driving down Chestnut, away from 30th. Two men, one of whom had been shot in the chest and was holding a handgun, were running behind the car, which had another person "already kind of half-in/half-out of the passenger seat." The bystander also saw a third man with dreadlocks moving down the sidewalk while pointing a handgun in the direction the two other men were running.

A woman who lived at 30th and Chestnut testified that she heard several gunshots and saw 10 to 15 men standing in the intersection, some of whom were shooting down Chestnut. Three of the men who were shooting had just come from the vicinity of a

white Mercedes-Benz. After retreating toward the back of her house, she looked outside again, and the same three men still appeared to be shooting. According to her, one of them had a rifle, one had a "larger handgun with [an] extended clip," and one had a "regular handgun." She thought that the man holding the rifle had dreadlocks.[2] The men then drove away in a light-colored car.

I. The Aftermath and the Physical Evidence.

Harbin's girlfriend testified that she returned to Third World with two other women, intending "[t]o go fight the girls that jumped [her]." As they arrived, they "heard a lady was killed or unconscious," and they saw Pierce lying on the ground. Harbin's girlfriend walked up Chestnut and saw Ambrose lying on the side of a house a few doors down from Pierce's, "bleeding really bad." Harbin's girlfriend had grown up with Ambrose and characterized him as "like a little cousin to [her]," and she was recorded yelling at police officers to help him. Sims had been shot as well and also eventually arrived at the hospital.

Meanwhile, as Ward's girlfriend's cousins were trying to return to the scene, they heard gunshots. They saw McDaniels and another person driving away in Ward's Acura, which the older cousin found "suspicious" since Ward had just bought it from her sister. Stills also told the police that after the shooting was over, he saw McDaniels steal Ward's car and leave the scene.

Harbin, who was shot in the back, managed to return to his uncle's house, and his Buick was later towed from Mead. Its rear window had been shot out from outside, and it had several holes and ricochet marks caused by other shots fired from both inside and outside the vehicle. Consistent with Harbin's testimony that he had fired a .45-caliber

[2] When shown a photograph of Goofy, who had been at the liquor store with Davis and also had dreadlocks, this witness indicated that the dreadlocks of the man she saw holding the rifle were more like Goofy's than like Davis's. The photograph of Goofy was admitted with his face obscured, however, and it does not appear that the jury was informed it was a photograph of him. Nor did any witness remember Goofy being at the scene during the shooting. Harbin also testified that a man with dreadlocks he knew as "Vic" was at 30th and Chestnut when Harbin originally arrived there with his girlfriend, but there was no other evidence that this man was present during the shooting.

handgun, a .45-caliber shell casing was recovered from the floorboard behind the driver's seat, and another .45-caliber shell casing shot by the same gun was found underneath the car. Harbin testified that the day after the murder he traded the gun he had shot for a 9mm-caliber Taurus handgun, which he had when he was arrested, and his .45-caliber gun was never recovered.

The evidence showed that at least five different weapons in addition to Harbin's .45-caliber handgun were fired at the scene. First, a Springfield Armory semiautomatic .45-caliber pistol, which had Sims's blood on it, and two boxes of .45-caliber ammunition were recovered from Reed's sister's house. A cluster of five casings discharged by that gun were recovered near 30th and Chestnut.

Second, a Bersa mini Firestorm .40-caliber pistol, which had Ambrose's blood on it, was recovered near the driveway where Ambrose was found. Nine casings from the Firestorm were found at the scene.

Third, a Glock .40-caliber pistol that fired 20 of the casings found at the scene was recovered from the house of a second girlfriend of Harbin's. This girlfriend testified that four days after the murder, she found the gun hidden in her reclining chair and placed it in a bag in the closet. The Glock had DNA from three people on it, including Harbin. Implying that the Glock belonged to McDaniels, Harbin testified that he handled the weapon when hiding it at his girlfriend's house but that it was not his.

Fourth, four .223-caliber casings fired by the same gun were recovered at the scene. A criminalist testified that an AR-15 assault rifle is the most common type of gun used to shoot such cartridges. No AR-15 or other similar gun was ever recovered, but boxes of .223-caliber ammunition were also recovered from Harbin's second girlfriend's house. The girlfriend testified that within a few days of the murder, Harbin and McDaniels arrived at her house. They had a long, black gun on the backseat floor of their car, and she refused to let Harbin bring it in the house. Harbin testified that he did not know what ultimately happened to this weapon, which he did not know McDaniels had until after the shooting.

Finally, a single .38/.357-caliber bullet shot by an unrecovered firearm was found a couple feet from Pierce's head and had her DNA on it. The criminalist testified that the bullet was of a caliber one "would normally associate with a revolver," a type of gun that does not expend casings. The evidence tended to suggest, by process of elimination, that Davis fired this gun.

After Davis was arrested, he made a telephone call to his girlfriend, a recording of which was played for the jury. Davis indicated that he had been arrested for a homicide and said, "[I]t's 15 people tellin' on me. [¶] . . . [¶] . . . Third [W]orld niggas, [B]ottom niggas, and regular civilians." Later in the conversation, he stated that "every Third World nigga they talk to told them [he] was there" and expressed surprise that McDaniels in particular had said something about him. When his girlfriend expressed sympathy, Davis said, "It ain't over though, but just temporary. I gotta fight it. . . . From the self-defense point of view."

J. The Verdicts and Sentencing.

The jury convicted Davis of one count of second degree murder and found that he personally and intentionally discharged a firearm causing death, personally and intentionally discharged a firearm, and used a firearm during the crime.[3] The trial court sentenced him to a total term of 40 years to life in prison, composed of a term of 15 years to life for the murder and a consecutive term of 25 years to life for the personal and intentional discharge of a firearm causing death. Twenty- and ten-year terms for the other two firearm enhancements were imposed and stayed.

The jury convicted Stills of one count of second degree murder and found that he or a principal was armed with a firearm during the offense.[4] The trial court sentenced

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[3] Davis's conviction was under Penal Code section 187, subdivision (a), and the firearm enhancements were found true under Penal Code section 12022.53, subdivisions (b) (use of firearm), (c) (intentional discharge), and (d) (intentional discharge causing death). All further statutory references are to the Penal Code.

[4] Stills's conviction was also under section 187, subdivision (a), and the arming enhancement was found true under section 12022, subdivision (a)(1).

him to a total term of 16 years to life in prison, composed of a term of 15 years to life for the murder and a consecutive one-year term for the arming enhancement.

II.
DISCUSSION

A. Davis Is Not Entitled to Relief on His Claim of Prosecutorial Misconduct.

Davis claims that his conviction must be reversed because the prosecutor "improperly insinuated that [he] was responsible for the attempt on [R.B.'s] life after she identified him as a shooter at the preliminary hearing." We are not persuaded.

1. Additional facts.

As noted above, R.B. initially told the police that she had not seen Davis shoot but testified otherwise at the preliminary hearing. At trial, and over Sims's objection, the prosecutor elicited testimony from R.B. that someone shot at her after she testified at the preliminary hearing.

Under cross-examination by the prosecutor, Harbin confirmed that he had directed his girlfriend to take R.B. to the police department so R.B. could state what she had seen. The prosecutor insinuated that Harbin was putting R.B. at risk, given Harbin's admission that snitching could get one killed. Harbin denied, however, that it would be more dangerous for R.B. to snitch on people from Third World, her own neighborhood, than those from another neighborhood: "Well, the way these streets work, if you're telling one person, you're telling everybody. So if you're telling somebody from The Bottoms, then it's automatically assumed that if something happened here, you'd tell on somebody from here, too. So there's really no distinction. It's just if you snitch, you're done." The following exchange then occurred:

> [PROSECUTOR]: . . . [W]hen [R.B.] went to the preliminary hearing and she said, "[Davis] shot—"
>
> [HARBIN]: Right.
>
> [PROSECUTOR]: —she got shot at; right?

Davis immediately objected, and the trial court held a conference with counsel in chambers. Back on the record, the court struck the prosecutor's question and directed the

jury to disregard it. In response to additional questioning, Harbin then confirmed that he, Davis, Stills, and Sims were all in custody at the time of the preliminary hearing.

Outside of the jury's presence, Davis moved for a mistrial based on the prosecutor's stricken question. Davis argued that the "clear import" of R.B.'s testimony was that she was shot at because for the first time she had identified him as a shooter. He argued that it was impossible, despite the trial court's direction, for the jury to ignore the "highly explosive" implication that he had been responsible.

The prosecutor responded that he had asked the question because Harbin said that "snitching on anybody in Oakland puts you at the same amount of risk, which is simply untrue." The prosecutor denied that he intended to create any "inference . . . that somehow Mr. Davis is manipulating people outside [in] Third World and somehow he's responsible for being some Don of this Third World crime family." The prosecutor characterized such an inference as "far-fetched . . . given the state of the evidence" and stated he did not intend to argue it.

The trial court denied the motion for a mistrial. It explained that it had "immediately admonished the jury to disregard the question" and would do so "again to make sure that there's no misunderstanding." Although the court acknowledged that the question raised concern, it concluded that "a direct and immediate admonishment . . . [was] more than adequate," particularly given the presumption that the jury would follow that instruction.

After the jury returned, the trial court admonished it as follows:

> You have heard testimony in this case from [R.B.] that during her testimony at the preliminary hearing she was shot at. Today, in this trial, a question was asked of Mr. Harbin . . . about that which mentioned a co-defendant, Mr. Davis.
>
> I am instructing you in the most direct way possible that there is no evidence, direct or circumstantial, as to who was responsible for the shooting at [R.B.], and that there's absolutely no evidence that any of the defendants in this case were involved in any way. You are to disregard the question that was asked today and the question of who may have shot at

[R.B.] is not to be considered or discussed by you at any point or for any reason.

2. Discussion.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is [nonetheless] prosecutorial misconduct under state law . . . if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"The rule is well established that the [prosecutor] may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' " (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) In particular, questioning that insinuates that a defendant has attempted to coerce a witness's testimony is improper if the prosecutor is not prepared to substantiate the insinuation. (See *People v. Pearson* (2013) 56 Cal.4th 393, 434; *People v. Perez* (1962) 58 Cal.2d 229, 240-241, overruled on another point in *People v. Green* (1980) 27 Cal.3d 1, 32-34.) In other words, the prosecutor must have "a good faith belief that he [or she] could have produced a witness [or other evidence] to provide a factual basis for the questioning." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.)

As Davis indicates, "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) But the type of prosecutorial error alleged here does require some measure of bad faith. (See *People v. Mooc*, *supra*, 26 Cal.4th at p. 1233.) According to the prosecutor, he did not intend to imply that Davis was responsible for the shooting at R.B., and it appears his questioning was primarily aimed at undermining Harbin's credibility. Thus, we are unable to conclude that the prosecutor acted without "a good faith belief" in the existence of evidence that Davis was

involved in the shooting at R.B., an issue it appears the prosecutor simply did not consider. (*Ibid.*)

In any case, even assuming the prosecutor's question was improper, "prejudice is lacking under either the state law (see *People v. Watson* (1956) 46 Cal.2d 818, 836 [*Watson*]) or the federal constitutional standard of review (see *Chapman* [*v. California* (1967)] 386 U.S. [18,] 24 [*Chapman*])." (*People v. Booker* (2011) 51 Cal.4th 141, 186.) Although we acknowledge that the evidence against Davis was not overwhelming, we cannot agree with him that the prosecutor's question "helped . . . immeasurably in convincing the jury to convict [him]" or that the jury "undoubtedly concluded" he was guilty based on the question. And although Davis cites cases involving prosecutorial misconduct that could not be cured through an admonition, we disagree that the prosecutor's conduct here falls into that category. Crucially, the trial court admonished the jury not only that it must disregard the question but also that there was "absolutely no evidence that any of the defendants in this case were involved in any way" in the shooting at R.B. and that the topic was irrelevant to the jury's deliberations. We must presume that the jury heeded the court's admonishment and did not draw any negative inference against Davis based on the question. (See *People v. Pearson*, *supra*, 56 Cal.4th at pp. 434-435.) As a result, any impropriety was harmless.

B. Instructing the Jury on Mutual Combat Did Not Cause Prejudice.

Both defendants contend that the trial court erred by instructing the jury on mutual combat. We conclude that any error was harmless.

1. Additional facts.

The prosecutor asked for the jury to be instructed under CALCRIM No. 3471, the standard instruction limiting a defendant's right to self-defense when engaged in mutual combat. Stills, joined by the other defendants, objected that the instruction did not "apply to any of these defendants" and should not be given except upon a defendant's request. The trial court indicated its view that the instruction was an accurate statement of the law.

Although the trial court did not explicitly rule on the prosecution's request, it later gave CALCRIM No. 3471, including the optional bracketed language defining mutual

combat, as follows: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] 2. He indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self[-]defense arose."

2. Discussion.

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Perfect self-defense or defense of another is a complete defense to murder. (*People v. Moye* (2009) 47 Cal.4th 537, 550.) For a killing to be in perfect self-defense or defense of another, "one must actually *and* reasonably believe in the necessity of defending oneself [or another] from imminent danger of death or great bodily injury" by using deadly force. (*People v. Randle* (2005) 35 Cal.4th 987, 994, disapproved on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744.) Imperfect self-defense or defense of another also requires an actual belief in the need to defend using deadly force, but the belief is unreasonable. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583; *In re Christian S.* (1994) 7 Cal.4th 768, 773.) Such a belief negates malice and therefore reduces murder to voluntary manslaughter. (*Manriquez*, at p. 583.)

Self-defense or defense of another is not available if the defendant "engaged in mutual combat," unless he or she "really and in good faith . . . endeavored to decline any further struggle before the homicide was committed." (§ 197, subd. (3).) The doctrine of mutual combat "applies . . . to a violent confrontation conducted pursuant to prearrangement, mutual consent, or an express or implied agreement to fight." (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1036 (*Ross*).) "In other words, it is not merely the combat, but the preexisting intention to engage in it, that must be mutual." (*Id.* at

p. 1045, italics omitted; accord *People v. Nguyen* (2015) 61 Cal.4th 1015, 1044.) Although "[t]he agreement need not have all the characteristics of a legally binding contract, . . . there must be evidence from which the jury could reasonably find that both combatants actually consented or intended to fight before the claimed occasion for self-defense [or defense of another] arose." (*Ross*, at p. 1047, italics omitted.)

A party is entitled to a requested jury instruction if the instruction is supported by substantial evidence—that is, " 'evidence that a reasonable jury could find persuasive.' " (*Ross, supra*, 155 Cal.App.4th at pp. 1049-1050.) Conversely, "[i]t is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) We review claims of instructional error de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569-570.)

Initially, we disagree with defendants that the trial court erred by giving the instruction on mutual combat because "it was inconsistent with the imperfect self-defense voluntary-manslaughter defense theory of the case, and objected to by the defense." Although defendants do not develop this claim, it appears to be based on a portion of the Bench Notes to CALCRIM No. 3471 providing that "[w]hen the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, . . . it should ascertain whether [the] defendant wishes instruction on this alternate theory." (Judicial Council of Cal., Crim. Jury Instns. (2018) Bench Notes to CALCRIM No. 3471 (2018 ed. pp. 1005-1006).) But this principle applies when a court is deciding whether to instruct on a defense in the first place, not when the court is determining which pinpoint instructions may be necessary to instruct fully on the defense. Having elected to pursue a theory of self-defense and/or defense of another, defendants were not automatically entitled to veto an instruction on a certain limit to those defenses.

We do, however, agree with defendants that the evidence to establish mutual combat was weak. The prosecutor attempted to paint the conflict as a showdown between two rival groups. It is true that a finding of mutual combat may be premised on a "preexisting intention to engage in hostilities whenever the opportunity presented

itself," such as where there is evidence of an ongoing gang war. (*People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1044, 1096.) But numerous witnesses indicated there was no ongoing tension between Third World and the Bottoms, much less a "state of war" (*id.* at p. 1044), and several participants had ties on both sides of this supposed divide.

Nor was there much evidence that demonstrated a specific preexisting agreement between the two groups of men—Ward, Sims, and Ambrose on one side, and Harbin, McDaniels, Davis, and Stills on the other—to engage in combat. The prosecutor relied on the testimony of witnesses that they thought something bad was going to happen, but foreboding feelings, particularly those of people who did not even participate in the shootout, are insufficient to establish an agreement to fight. Indeed, as defendants point out, Ward arrived at 30th and Chestnut and spoke to McDaniels, a friend of his, without any fight starting, which is at odds with the notion that the two groups had already agreed to combat. The shooting did not begin until the arrival of Harbin, who at least somewhat credibly testified that he was trying to resolve the situation and did not expect to be fired upon when he returned.

Evidence that Davis and Stills in particular joined an agreement to fight with the group representing the Bottoms was also lacking. Little evidence was presented about Davis's actions leading up to the shooting, much less his involvement in any plan to fight the other group. And Stills was friendly with people from both neighborhoods, did not have his own weapon, and did not become involved in the gunfight until McDaniels's weapon jammed. Although Stills and McDaniels had discussed the presence of McDaniels's rifle, suggesting they anticipated violence might ensue, there was no evidence they had a meeting of the minds with the group representing the Bottoms before the shooting began.

Ultimately, we need not decide whether there was sufficient evidence to justify an instruction on mutual combat because any error in giving the instruction was harmless. Defendants contend that the instruction "defeated the defense theory of voluntary manslaughter, thus effectively depriving [them] of [their] federal constitutional right to present a defense to the murder charge." But as did *Ross*, we conclude that an

unwarranted instruction on mutual combat is not akin to the failure to instruct on a defense. (*Ross, supra,* 155 Cal.App.4th at p. 1054.) Rather, it erroneously presents "a *prosecution* theory in *rebuttal* of the defense," which *Ross* characterized as "ordinary error" not requiring reversal unless it is reasonably probable that the defendant would have obtained a more favorable verdict had the instruction not been given. (*Id.* at pp. 1054-1055, citing *Watson, supra,* 45 Cal.2d at p. 836.) Thus, we reject defendants' claim that the appropriate question is whether any error was harmless beyond a reasonable doubt under *Chapman, supra,* 386 U.S. at p. 24.

We conclude that neither Stills nor Davis was prejudiced by the instruction on mutual combat. To begin with, as *Ross* suggests, a jury instruction that lacks evidence to support it can be held harmless "because juries are said to ignore irrelevant instructions." (*Ross, supra,* 155 Cal.App.4th at p. 1055.) Here, the trial court instructed the jury under CALCRIM No. 200 that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. And do not assume that just because I give a particular instruction that I'm suggesting anything about the facts. After you have decided what the facts are, follow the law, follow the instructions that apply to the facts as you find them." Ultimately, *Ross* declined to rely on this principle to hold harmless the instructional error there because the jury was not "properly instructed on the meaning of 'mutual combat' " in either the original instruction or in response to the jury's request for further guidance on the concept. (*Ross,* at pp. 1042-1043, 1056.) Here, in contrast, defendants do not challenge the correctness of the trial court's instruction on the legal definition of mutual combat. Although we acknowledge that the prosecutor relied on the concept of mutual combat in closing, the weak evidence of a preexisting agreement between the two sides lessens the likelihood that the jury applied CALCRIM No. 3471.

Moreover, the evidence that either Stills or Davis acted in self-defense or defense of another was also weak. The pertinent question in assessing prejudice is whether there is a reasonable probability that, absent the mutual-combat instruction, one or more jurors would have entertained a reasonable doubt as to whether the prosecution had proved that Stills and Davis had not acted in self-defense or defense of another. (See *Ross, supra,*

155 Cal.App.4th at p. 1055.) Although Stills told the police he was "afraid," his other statements were at odds with the idea he gave the rifle to McDaniels either to protect himself or to help protect Harbin or McDaniels. Instead, Stills told the police that he helped McDaniels because he did not want to be perceived as afraid or disloyal. And the evidence that Davis acted to defend himself or another was even weaker. Although it appears that he did not begin shooting at Ambrose and Sims until they fired on Harbin, there was evidence that he pursued them, still firing, even after they were hit. In short, we conclude that even if the instruction on mutual combat should not have been given, the error was harmless.

C. Any Error in the Omission of a Jury Instruction on Transferred Intent Was Also Harmless.

Both defendants also claim that the trial court erred by refusing to instruct on transferred intent as it applies to self-defense. We reject this claim.

1. Additional facts.

The trial court agreed to instruct the jury on perfect self-defense under CALCRIM No. 505 and imperfect self-defense under CALCRIM No. 571. After stating that it was not giving CALCRIM No. 521 on first degree murder, the court also confirmed that it would not give CALCRIM No. 562 on transferred intent, which states, "If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed." (CALCRIM No. 562.) The court explained, "562, I think, only applies where you have a specific intent, it would apply first. If you don't give it first, then I don't think you give 562."

During a later discussion of jury instructions, Stills, joined by Davis, asked for an instruction on transferred intent as it applies to self-defense. Specifically, they requested the following instruction: " '[T]he doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander.' " (Judicial Council of Cal., Crim. Jury Instns. (2018) Related Issues to CALCRIM No. 505, p. 219, quoting *People v. Mathews* (1979) 91 Cal.App.3d 1018, 1024 (*Mathews*).)

Sims and the prosecutor opposed the request on the basis that there was no substantial evidence that Stills acted in self-defense, since Stills told the police that he gave the rifle to McDaniels "because he didn't want people to think he was afraid and he did it out of loyalty." The trial court agreed and denied the request, explaining that "a fair reading of that statement taken . . . in its entirety" was that Stills passed the gun because "he didn't want to be considered scared or unwilling to contribute or pitch in, so to speak."

The following day, Stills moved for reconsideration of the request and sought permission to argue that as an aider and abettor of McDaniels, he shared McDaniels's intent of defending Harbin. The trial court responded, "[I]f you want to make certain arguments, I think they might be appropriate. But as far as giving that particular instruction as it relates to Mr. Stills, the ruling that I made will stand." In then urging during closing argument that Stills did not act with implied malice, Stills's trial counsel stated, "It was more likely in my mind that [Stills] was acting maybe to save his life or to save the life of [McDaniels], who Mr. Harbin suggested was defending him from the sudden act. Rather than having a conscious disregard for . . . others, it seems that he must have been working out of duress and menace over the situation."

2. Discussion.

"[I]n its principal application," the concept of transferred intent "establishes that one's criminal intent follows the corresponding criminal act to its unintended consequences." (*Mathews*, *supra*, 91 Cal.App.3d at p. 1023.) Thus, " '[i]t has been long accepted that if A shoots B, intending to kill B, but instead the bullet strikes C, then A has committed a criminal act as to C. In such instance, the "malice follows the blow" and the criminal intent of A to harm B is transferred to C.' " (*Ibid.*) *Mathews* followed other jurisdictions in recognizing that "the reasoning applies equally to carry the *lack of criminal intent* to the unintended consequences and thus preclude criminal responsibility." (*Ibid.*; accord *People v. Levitt* (1984) 156 Cal.App.3d 500, 507, disapproved on other grounds by *People v. Johnson* (2016) 62 Cal.4th 600, 649, fn. 6.) Thus, " 'if A had no criminal intent with respect to B, as where A is exercising a lawful

right to self-defense, none could exist as to C. . . . The inquiry must be whether the killing would have been justifiable if the accused had killed the person whom he [or she] intended to kill, as the unintended act derives its character from the intended.' " (*Mathews*, at pp. 1023-1024.)

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." ' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1223.) " 'In addition, "a defendant has a right [upon request] to an instruction that pinpoints the theory of the defense." ' " (*People v. Burney* (2009) 47 Cal.4th 203, 246; see *Mathews*, *supra*, 91 Cal.App.3d at pp. 1024-1025 [no duty to instruct sua sponte on transferred intent as it applies to self-defense].) A court may decline to give an instruction requested by the defendant, however, " 'if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.' " (*Burney*, at p. 246.) Again, our review of this claim is de novo. (See *People v. Guiuan*, *supra*, 18 Cal.4th at pp. 569-570.)

To begin with, we will assume without deciding that substantial evidence supported giving this instruction as to both Stills and Davis. Without limitation to particular defendants, the jury was instructed on perfect self-defense or defense of another under CALCRIM No. 505 and imperfect self-defense or defense of another under CALCRIM No. 571. If the trial court correctly determined that substantial evidence supported these instructions as to Stills and Davis, we do not see how there was insufficient evidence to support an instruction on transferred intent, since it was undisputed that Pierce was not the target of any gunfire.

We conclude, however, that the omission of an instruction on transferred intent was harmless. Defendants claim that the instruction's omission violated their federal constitutional rights to due process and to present a defense. But they do not cite any authority in support of their contention or otherwise attempt to demonstrate how the omission rose to the level of federal error. As a result, we will assess prejudice under the *Watson* standard that generally applies to the omission of a requested pinpoint

instruction, under which we reverse only if it is reasonably probable that the defendant would have obtained a better result had the instruction been given. (*People v. Wharton* (1991) 53 Cal.3d 522, 571 & fn. 10.)

As noted in part II.B.2. above, the evidence that either Stills or Davis acted in self-defense or defense of another was weak. Although Stills acknowledges that he told the police he gave McDaniels the rifle because "he 'didn't want everybody to think [he] was a – a, like, scared or something,' " he suggests that his claim to have been scared was enough on which to premise a finding of self-defense. But standing alone, Stills's statement that during the shootout he was afraid could not be the basis for a finding that he acted in self-defense. As we have said, both perfect and imperfect self-defense require an actual belief in the need to use deadly force to defend against an imminent danger of death or great bodily injury. (*People v. Randle, supra,* 35 Cal.4th at p. 997; *In re Christian S., supra,* 7 Cal.4th at p. 773.) Even assuming that, reasonably or unreasonably, Stills legitimately feared for his life, there is no evidence to suggest that he gave the rifle to McDaniels out of a belief that doing so was necessary to protect himself.

Davis argues that "the evidence associated with [him] supported a finding that to the extent [he] fired a weapon at the scene, he only shot in self-defense." As he points out, R.B., the only witness to identify him as a shooter, testified that she saw him shooting after Sims and Ambrose had begun the gunfight. Davis claims that "[b]ased on this evidence, and the otherwise uncertain nature of what took place during the chaos of the shooting incident, the jury easily could have found that [he] fired a weapon in order to defend himself or others." But there was no clear evidence that Davis himself was fired upon. And, in the absence of any other evidence suggestive of his intent, it would be speculative to assume that he started shooting out of an intent to protect Harbin or McDaniels, especially given that the evidence suggests he continued to shoot at Sims, Ambrose, or both as they ran. We conclude that there is no reasonable probability that either Stills or Davis would have received a more favorable verdict had an instruction on transferred intent been given.

D. Davis Is Entitled to a Remand Under Senate Bill No. 620.

Finally, Davis claims that he is entitled to a remand for the trial court to exercise its discretion whether to strike one or more of the firearm enhancements. We agree with the Attorney General that a remand is appropriate.

At the time it sentenced Davis in August 2017, the trial court did not have discretion to strike the firearm enhancements imposed under section 12022.53. (Former § 12022.53, subd. (h).) In October 2017, however, the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. The statute now provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) It is settled that the legislation applies retroactively to non-final judgments. (*People v. McVey* (2018) 24 Cal.App.5th 405, 418; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507-508.)

A remand for a trial court to exercise its discretion under Senate Bill No. 620 is required "unless the record shows that the . . . court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) Here, the record contains no such clear indication. Indeed, while sentencing Davis the trial court emphasized that the terms for the firearm enhancements were mandatory. Therefore, we agree with the parties that Davis is entitled to a remand for the court to consider whether to strike the firearm enhancement under section 12022.53, subdivision (d), and then either impose time for one of the stayed lesser firearm enhancements or strike them as well. (See *McDaniels*, at p. 428.)

III.
DISPOSITION

The judgment against Stills is affirmed. Davis's conviction is affirmed, and the case is remanded for the trial court to consider whether to strike one or more of the three firearm enhancements imposed against him under Penal Code section 12022.53.

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Humes, P.J.

WE CONCUR:

_____

Banke, J.

_____

Sanchez, J.

People v. Davis (A152259); *People v. Stills* (A153136)